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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1972

No. 72-5203

ELIZABETH CRADLE,
Petitioner,

-vs-

STATE OF NORTH CAROLINA,
Respondent.

BRIEF OF RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PETITION NOT PRINTED

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OPINIONS BELOW

From a verdict of guilty of uttering a forged check, and judgment of imprisonment entered by the Superior Court on the 11th day of June, 1971, defendant appealed to the North Carolina Court of Appeals. The opinion of the North Carolina Court of Appeals (Intermediate Appellate Court) affirming the conviction of the trial court is reported in 13 N.C. App. 120, 185 S.E. 2d 35 (1972). From this decision the defendant appealed to the Supreme Court of North Carolina. The opinion of the Supreme Court of North Carolina affirming the conviction of the trial court is reported at 281 N.C. 198, 188 S.E. 2d 296 (1972).

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. § 1257(3).

QUESTION PRESENTED

WHETHER THE STATE MET ITS BURDEN OF PROVING THAT THE FAILURE TO APPOINT COUNSEL TO REPRESENT THE INDIGENT DEFENDANT AT HER PRELIMINARY HEARING IN VIOLATION OF HER RIGHT TO COUNSEL WAS HARMLESS CONSTITUTIONAL ERROR BEYOND A REASONABLE DOUBT IN CIRCUMSTANCES WHERE NO RECORD OF THE PRELIMINARY HEARING WAS PRESERVED AND DEFENDANT'S APPOINTED TRIAL COUNSEL WAS FORCED TO TRIAL BEFORE HE HAD TIME TO PREPARE.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT VI.

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

AMENDMENT XIV.

"§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF CASE

The petitioner was charged on a two count bill of indictment with forgery and uttering a forged check. On June 7, 1971, petitioner appeared in the Superior Court of Orange County with court-appointed counsel and entered a plea of not guilty to both counts. Trial started immediately; at the close of the State's evidence a directed verdict of not guilty was entered as to the forgery count. From a verdict of guilty of uttering a forged instrument and judgment of imprisonment, the petitioner appealed. The North Carolina Court of Appeals affirmed the conviction, from this decision the petitioner appealed. The Supreme Court of North Carolina affirmed the conviction. Copies of the opinions of the North Carolina Court of Appeals and the Supreme Court of North Carolina are appended to the petition.

STATEMENT OF FACTS

A complaint for arrest on information and belief of the petitioner was sworn out by Lt. John W. Blackwood before a magistrate on February 25, 1971. This complaint was for uttering a forged check in the amount of $50.00 to Central Carolina Farmers, Inc., of Carrboro, North Carolina, on January 15, 1971. The complaint named the bank on which the check was drawn as well as the payee of the check.

Pursuant to the complaint, an arrest warrant was issued by the magistrate on February 25, 1971. The arrest warrant was served on the petitioner on March 5, 1971.

On March 22, 1971, petitioner executed an "Affidavit of Indigency" in which she swore that she was unemployed; that she had no income; that her parents were dead; that she had no money owed to her; that she was married, that her husband was unemployed; that she had three children; that the children had no income because they were not old enough to work; that she owned a '58 Chevrolet car which was paid for; that neither she nor her spouse owned any property anywhere and that she owed $3,000.00. In this affidavit, petitioner requested the Court to appoint Counsel to represent her in this action.

The following day on March 23, 1971, C. C. Cates, Jr.,

District Judge, entered an order denying the appointment of counsel for that petitioner was not indigent.

On March 30, 1971, a preliminary examination of petitioner was held. No transcript of the proceedings was made. As a result of the hearing, probable cause was found, petitioner was bound over for trial at the April 20, 1971, Session of the Orange County Superior Court and bond was set in the amount of $1,000.00. Petitioner's father-in-law posted bond for her and she remained free of custody.

On April 26, 1971, the Orange County Grand Jury returned as a true bill a two count indictment charging petitioner with forgery and uttering a forged check.

Later, on June 1, 1971, the presiding Judge of the Superior Court determined the petitioner to be indigent and appointed Roy M. Cole to represent her. Mr. Cole was informed of his appointment on Thursday, June 3, 1971, and talked with petitioner at that time. At the time, Mr. Cole was representing the petitioner in four other cases which were also pending during the same session of Superior Court. Mr. Cole conferred with the Solicitor (prosecutor) for about five minutes after the close of Court on Friday, June 4, 1971. At that conference Mr. Cole indicated to the Solicitor that he was prepared to go to trial in case number 111-71-1606, the case at bar. Mr. Cole was advised by the Solicitor that case number 111-71-1606 might be called for trial and the Solicitor marked that case on his calendar with a "T". The following Monday, June 7, 1971, Mr. Cole moved for a continuance on the grounds he was unprepared for trial due to his short notice. After an exchange between the trial judge, the solicitor, the petitioner and Mr. Cole, the motion was denied. The trial started immediately thereafter.

ARGUMENT

Petitioner's reasons for granting the writ seem to center around the following propositions:

(1) The failure to appoint counsel at the preliminary hearing stage severely prejudiced the petitioner in the later trial and, in effect, was a denial of counsel.

(2) The State has failed to show beyond a reasonable doubt failure to appoint counsel before the preliminary hearing was harmless error.

Coleman v. Alabama, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed 2d 387 (1970), relied on by petitioner, contained no opinion for the court. Nevertheless, a majority agreed that the failure to appoint counsel at a typical state preliminary examination was a constitutional violation. The majority went on to point out, however, that this omission would not necessarily require a reversal of an ensuing conviction if the loss of the advantages to be gained by assistance of counsel at the preliminary hearing had no significant bearing on the outcome of the later trial. Consequently, the case was remanded to the lower court to determine whether the denial of counsel was harmless error under *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967). Four members of the majority made no effort to explore the harmless error concept as applied to *Coleman* beyond citing *Chapman*. Two members, however, suggested that the denial of counsel would constitute harmless error unless the defendant could point to a specific omission or action at the preliminary hearing that had a direct impact on the trial such as that "important testimony of a witness unavailable at trial could have been preserved had counsel been present." *Coleman v. Alabama, supra* (Mr. Justice White Concurring) Other, more general advantages of counsel such as that counsel may have persuaded the magistrate to dismiss the case, may have known more about the State's case before trial, or may have obtained defendant's release on bail were viewed as too speculative in their bearing upon the trial itself to require reversal of an otherwise valid conviction.

It is submitted by the respondent that the record fails to show a specific omission or action that had a direct impact on the trial. The crime with which petitioner was charged involved a simple factual situation; all events occurred within a narrow geographic area of about ten miles or less; charges were brought within 40 days after the forged check was passed; all witnesses as well as all principals involved in the transaction lived in the county and were known to each other before and after the date of the transaction; following the preliminary hearing, bond in a reasonable amount was set for petitioner who posted this bond and remained free until the trial; counsel was later appointed six days before the trial; and

counsel assisted her during the trial and on the subsequent appeals. It is interesting to note that the following witnesses were called by the prosecution during the course of the trial: Irma Lucas Davis, the office manager of Central Carolina Farmers, Inc.; Lt. John W. Blackwood of the Carrboro Police Department; Bennie R. Duty on whose personalized checks the one uttered was written and Earl Eversole who lived in the same house with Mr. Duty. Lt. Blackwood signed the original complaint on February 25, 1971; the names of Mrs. Davis and Mr. Duty appeared on the bill of indictment submitted to the Grand Jury on April 26, 1971, as possible witnesses. Thus it appears that the names of three of the four State's witnesses were on public documents on file in the courthouse at least two months before the trial. Moreover, petitioner was acquainted with Mr. Eversole at least one month before the check was passed. Based on these facts, it can hardly be argued that petitioner or her counsel were caught by surprise at the trial with the witnesses presented by the State.

Petitioner makes much ado over the fact her counsel was not appointed until about a week before the trial and that it was unclear until the morning of the trial which of four pending cases was actually going to be tried. The fact remains, however, that counsel had actual notice of his appointment the preceding Thursday; conferred with petitioner that day; conferred with the prosecutor the following afternoon; advised the prosecutor that he was prepared for trial on all cases then pending involving the petitioner and, on the following Monday, stated he was not prepared for trial. As pointed out above, if this case had involved a complex factual situation; out-of-state witnesses or complex defenses, then there might be some merit to this argument. In view of the relative simplicity of the case; the fact that all of the State's witnesses were within a few miles of counsel's office; the fact that the names of three of these witnesses could have been learned from the official court papers; the fact that the basic dates and transactions were set forth in great detail in the warrant and indictment and that a photocopy of the check was attached to the indictment, preparation for trial was uncomplicated. Surely counsel could have advised petitioner on Thursday to bring her records to his office either that afternoon or the following morning. From the exchange in the trial judge's chambers before the trial on Monday morning, it would appear that petitioner was most uncooperative in assisting her counsel to prepare her defense. It is submitted that this court

has declined to set a *per se* ruling requiring reversal of every conviction where there is late appointment of counsel. *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed. 2d 419 (1970) In summary, therefore, it is submitted there is no advantage that could have been gained in the preliminary hearing by the petitioner with the aid of counsel that was lost in the ensuing trial. In short, the petitioner has engaged in the sheerest speculation concerning advantages that might have been gained.

The petitioner argues further that the Supreme Court of North Carolina, in its decision, erroneously placed the burden on the petitioner to prove prejudice. This is simply not so. Surely the reviewing court is entitled to look at the record before it and draw such inferences as are warranted thereby. The petitioner is entitled to the same exercise which she has done with great vigor. The State, in order to satisfy its burden of proof, can draw certain inferences and conclusions from the silent record; if this cannot be done, the State can never effectively argue its case.

Finally, both sides can speculate forever on what might or might not have happened in this case if counsel had been appointed in March, 1971, before the preliminary hearing. The fact remains that counsel was not appointed. Whether the denial of counsel was justified or not is now beside the point and moot, since the Supreme Court of North Carolina has held counsel should have been appointed. The State of North Carolina is not seeking to avoid the command of any decision of this court; rather, the State is seeking to follow these commands to the best of its ability. At the same time, the State is seeking to avoid costly retrials if the result of the first trial was just and free from prejudicial error to the accused. The saving in time and costs can and will be used to more perfectly follow the commands of this court in later cases.

The evidence of guilt was clear and unequivocal. The violation of the criminal law of North Carolina is beyond question. An innocent business enterprise, Farmer's Equipment, Inc., was defrauded out of $50.00 of its money by a worthless check uttered by the petitioner. Conduct of this type is intolerable to society and must be punished. To require a costly retrial which would, in all likelihood, end in the same result would serve no just purpose. The failure to appoint counsel at a preliminary hearing will not be repeated in other cases. These considerations were in this court's

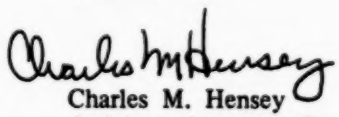
mind when it refused to fashion a *per se* rule in *Coleman*, preferring, instead, to apply the harmless error doctrine of *Chapman*. These considerations remain applicable to this case as well.

CONCLUSION

For the reason set forth above, the State of North Carolina prays that the writ of certiorari not issue and that the judgment and opinion of the Supreme Court of North Carolina remain as the law of this case.

Respectfully submitted,

ROBERT MORGAN
Attorney General of North Carolina



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